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No. 06-8

IN THE

Supreme Court of the United States

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED AIR LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Air Line Pilots Association, International ("ALPA") disagrees with Petitioners' statement of the questions presented. Review of the court of appeals' decision would present to this Court only a narrow, procedural and case-specific issue:

Whether, in the specific circumstances of this Chapter 11 case, including where the debtor and the union acting pursuant to Section 1113 of the Bankruptcy Code had already negotiated an agreement modifying the collective bargaining agreement, the pension plan had already been subject to termination proceedings and the debtor had already emerged from bankruptcy, it would have been feasible to grant a remedy to retired pension plan participants who claimed they should have been permitted to participate in the Section 1113 negotiations, assuming they had a right to participate?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were United Retired Pilots Benefits Protection Association ("URPBPA"), Roger D. Hall, Dennis D. Dillon, Gerard Terstiege, Eugene Cummings, Raymond P. Fink, James M. Krasno, William L. Rutherford, United Air Lines, Inc. ("United") and ALPA.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 443 F.3d 565. The decision of the United States District Court for the Northern District of Illinois appears at 2005 WL 1528259.

STATEMENT OF JURISDICTION

The decision of the court of appeals issued on March 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

STATUTE INVOLVED

The statute involved in this case is 11 U.S.C. §1113.

STATEMENT OF THE CASE

At all relevant times, ALPA has been the exclusive collective bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. §§151-88, of the pilots employed by United, *see* D. 145, at 5; D. 148, at 2 (¶3), and has been party to a collective bargaining agreement ("the CBA") with United governing the terms of the pilots' employment. *See* D. 148, at 2 (¶3).[1] Under the RLA, ALPA does not represent retired pilots.

The CBA required United to maintain a defined benefit pension plan for the pilots ("the Plan") and set forth key terms of the Plan. *See* D. 148, at 2 (¶3); D. 1929, Exh. A, at 6 (§1.1(b)). The Plan, which was a "qualified" plan under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001-1461, provided a monthly pension benefit calculated based on a pilot's earnings. To the extent a retired pilot's benefit exceeded limits set by the Internal Revenue Code for payment from a qualified trust, United paid such "non-qualified" portion of the benefit directly to the retiree. *See* D. 9212, Exh. C.

United had a statutory obligation under ERISA to maintain the Plan unless and until the Plan was terminated pursuant to ERISA termination procedures. ERISA provides for termination procedures by a plan sponsor (typically the employer) under 29 U.S.C. §1341 and, alternatively, under 29 U.S.C. §1432, for termination procedures by the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that administers the government's pension insurance program.

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[1] "D. _____" refers to docket entries in *In re UAL*, Case No. 02-B-48191 (Bankr. N.D. Ill.) that were designated as part of the record in the appeal to the Court of Appeals for the Seventh Circuit.

On December 9, 2002, United filed for Chapter 11 bankruptcy protection in the Bankruptcy Court for the Northern District of Illinois. See D. 145. While in bankruptcy, United, pursuant to Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, made a proposal to ALPA to modify the CBA, including by removing any contractual requirement that it maintain the Plan. On November 24, 2004, having not yet reached an agreement with ALPA regarding its proposal, United filed a motion under Section 1113 for authority to reject the CBA. *See* D. 8814.

URPBPA is an association which claims as members a substantial number of retired United pilots. *See* Petition at 10. On December 10, 2004, while United and ALPA were engaged in negotiations required by Section 1113 over United's proposed modifications to the CBA, URPBPA filed a motion to have the bankruptcy court appoint it the representative of United's retired pilots in the Section 1113 negotiations. *See* D. 9212, at 31 (¶35). The bankruptcy court denied the motion on December 14, 2004, *see* Petition at App. 38, correctly noting that "there's no such thing" as a Section 1113-authorized representative for retirees, *id.* at App. 24, and further explaining to URPBPA that "you don't have a right to participate in negotiations regarding a collective bargaining agreement to which your members are not a party," *id.* at App. 25.

After complex and difficult negotiations, United and ALPA entered into an agreement ("Letter of Agreement") setting forth modifications to the CBA, which the bankruptcy court approved in an order dated January 31, 2005. *See* Petition at App. 39. The Letter of Agreement did not change any retired pilots' benefits under the Plan. ALPA agreed only to waive "any claim it may have that the termination of the [ ] Plan would violate the terms and conditions of the existing collective bargaining agreement" and to "not otherwise oppose [United's] efforts to terminate" the Plan under ERISA distress

termination provision 29 U.S.C. §1341. Petition at App. 15-16 (quoting Letter of Agreement ¶4(a)). The Letter of Agreement made clear that it was not to be construed "as any agreement of any form by [ALPA] that the [ ] Plan *should* be terminated." Petition at 16 (quoting ¶4(a)) (emphasis added). It further provided that the "Plan shall remain in full force and effect" until and unless United met the ERISA requirements for plan termination under 29 U.S.C. §1341. *Id.* (quoting ¶4(c)).

The Plan was later terminated, but not for any reason having to do with the Letter of Agreement. The Plan was terminated pursuant to an application by the PBGC under 29 U.S.C. 1342. *See* Petition at App. 5.[2] After initially reversing the bankruptcy court's approval of the PBGC's termination application, the district court granted the application on June 13, 2006. Petition at 15 n.10.

URPBPA appealed from the bankruptcy court's January 31, 2005 order approving the Letter of Agreement, claiming that it should have been allowed to participate in the negotiations that led to the agreement. On June 22, 2005, the United States District Court for the Northern District of Illinois dismissed the appeal, on the ground that the bankruptcy court's order was not a final order nor otherwise appealable. Petition at App. 14. URPBPA then appealed the district court's dismissal to the Seventh Circuit.

While URPBPA's appeal to the Seventh Circuit was pending, the bankruptcy court confirmed United's plan of reorganization and, in February 2006, United emerged from bankruptcy. *See* Petition at 14.

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[2] PBGC made this application after reaching a settlement agreement with United concerning United's obligations to the PBGC related to United's underfunded pension plans. *See In re UAL Corp.*, 428 F.3d 677, 681 (7th Cir. 2005).

On March 31, 2006, the Seventh Circuit issued its decision in URPBPA's appeal from approval of the Letter of Agreement. The court of appeals, unlike the district court, concluded that the bankruptcy court's order approving the Letter of Agreement was appealable. *See* Petition at App. 4.[3] The court of appeals nonetheless affirmed the district court's order. In a lengthy discussion, all of which is dictum, Judge Posner's opinion questioned whether the retired pilots should have been given the opportunity to participate in the Section 1113 negotiations between United and ALPA. *See id.* at App. 6-12. Without resolving that issue, the court affirmed the district court on the ground that, even if the bankruptcy court should have conditioned approval of an agreement between United and ALPA on the retirees' participation in the negotiations, "there is no longer any feasible remedy that a court could order." *Id.* at App. 12. The court reasoned that vacating the Letter of Agreement, which would be the "'logical'" remedy, would be "unnecessarily disruptive" since it might threaten "the unraveling of the section 1342 proceeding and perhaps of the entire bankruptcy." *Id.* The court concluded that, without the Letter of Agreement being vacated, the only other option would be remanding to the bankruptcy court to determine what the retirees would have received in the Section 1113 negotiations as consideration for agreeing not to oppose an effort by United to terminate the Plan, but, the court concluded, "there would be no objective basis for calculating" such an amount. *Id.*

Petitioners seek a writ of certiorari to the Seventh Circuit to have this Court "decide whether a Chapter 11 debtor is required to negotiate in good faith with an authorized representative for retirees and satisfy the other requirements

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[3] Although ALPA does not discuss the issue in this brief, ALPA reserves the right, should the Court grant certiorari, to argue that the district court was correct in finding that the bankruptcy court's January 31, 2005 order was not final or otherwise appealable.

of 11 U.S.C. §1113 with respect to those retirees before it modifies or terminates its contractual obligation to pay retiree pension benefits." Petition at 2-3. They seek such a ruling from this Court even though the Seventh Circuit's opinion did not decide whether retirees have a right to participate in Section 1113 negotiations and even though the Seventh Circuit's actual holding—that no remedy for the retirees would have been feasible under the particular circumstances of the case—does not conflict with any decision from another circuit.

ARGUMENT: THE PETITION SHOULD BE DENIED

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT WITH ANY OTHER CIRCUIT NOR OTHERWISE JUSTIFY THE EXERCISE OF THIS COURT'S SUPERVISORY POWER

This Court only issues a writ of certiorari for "compelling reasons," Sup. Ct. R. 10, such as when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." Sup. Ct. R. 10(a). No compelling reason exists for this Court to review the Seventh Circuit decision. The holding of that decision was narrow: the Seventh Circuit affirmed the district court on the ground that, even if the retirees had a right to participate in the Section 1113 negotiations, the particular circumstances and posture of the case would have made vacating the Letter of Agreement "unnecessarily disruptive" and thus no "feasible remedy" was available. Petition at App. 12. This narrow case-specific holding does not conflict with any decision from any other circuit.

In *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir. 1986), on which the Petitioners heavily rely, *see* Petition at 5-6, there was no settlement agreement between the debtor and the union; the bankruptcy court granted the debtor's Section 1113 motion to reject the collective bargaining

agreement. *See id.* at 269. The Second Circuit, therefore, did not and could not have addressed the issue on which the Seventh Circuit based its holding, namely, whether the existence of a Section 1113 settlement agreement, followed by a confirmed plan of reorganization, precluded a feasible remedy to retirees claiming to have been improperly excluded from the negotiations.

In *Century Brass,* the Second Circuit did hold that retirees must be given the opportunity to participate in Section 1113 negotiations under certain circumstances. *See id.* at 274. But the Seventh Circuit's decision does not conflict with that holding. While the Seventh Circuit addressed the participation issue in dictum, it took no definitive position on the matter. Accordingly, the Seventh Circuit's decision in no way gives rise to a conflict with the Second Circuit.

Nor does the Seventh Circuit's decision conflict with the Sixth Circuit's decision in *In re Unimet*, 842 F.2d 879 (6th Cir. 1988) (cited at Petition at 7). That decision held that absent rejection of a collective bargaining agreement under Section 1113, a debtor must continue to pay retiree health and life insurance benefits mandated by the collective bargaining agreement. *See id.* at 883-84. *Unimet* did not address whether retirees have a right to participate in Section 1113 negotiations nor—more importantly—did it address whether, if retirees are improperly excluded from participation, the existence of a settlement agreement followed by a confirmed plan of reorganization would preclude the issuance of a remedy.

The Seventh Circuit's decision not only fails to pose a conflict with any decision from another circuit but also presents no other compelling reason for this Court to grant a writ of certiorari. Its narrow, case-specific holding—that under the particular circumstances of this case no remedy was feasible—does not present an issue of nationwide signifi-

cance nor does it raise the type of fundamental question that would warrant this Court's review.

Unable to present any conflict in the circuits nor any fundamental legal controversy, petitioners fall back on arguing that this Court should grant review because, they assert, "elimination of the retired pilots' pension rights has impacted and will continue to affect thousands of retirees." Petition at 18. But the Letter of Agreement, and the Seventh Circuit decision letting it stand, did not deprive any retired United pilots of their pension benefits. Termination of the Plan came about through the PBGC's entirely separate proceeding under 29 U.S.C. §1342 and United's settlement with the PBGC. *See supra* n.2. No ruling from this Court reviewing the Seventh Circuit's decision would alter the fate of the retired pilots' pension benefits.

II. RETIREES DO NOT HAVE A RIGHT TO PARTICIPATE IN SECTION 1113 NEGOTIATIONS EVEN IF THE NEGOTIATIONS BEAR ON THEIR VESTED PENSION BENEFITS

Petitioners make their bid for a writ of certiorari based largely on their legal assertion that retirees have a right to participate in Section 1113 negotiations that might impact their vested pension benefits. *See* Petition at i (Question Presented #1), 21-22. As explained above, this is not an appropriate case for the Court to address that issue, because the Seventh Circuit's decision did not take a definitive position on the matter. But even if the Seventh Circuit had ruled that retirees have no right to participate in Section 1113 negotiations, there would be no compelling reason for this Court to review such a ruling because such ruling would be in full accord with the Bankruptcy Code and relevant legal principles.

Section 1113 sets forth strict procedural and substantive tests a debtor must satisfy before it is permitted to reject a

collective bargaining agreement. Among other things, the statute requires a debtor seeking to reject a collective bargaining agreement to "make a proposal to *the authorized representative of the employees* covered by such agreement," 11 U.S.C. §1113(b)(1)(A) (emphasis added), and then meet "with *the authorized representative* to confer in good faith in attempting to reach" agreement on the proposal, *id.* §1113(b)(2) (emphasis added). Nothing in the statute indicates that a debtor must, or may, negotiate with any party other than the union, such as retirees or their representative.

Section 1113's providing for negotiation only with the union accords with the basic premise of federal labor law that the employees' exclusive bargaining agent is the only party with which the employer has a duty and right to bargain. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944) (explaining that employer has duty to bargain collectively with chosen representative of its employees and a "'negative duty to treat with no other'") (citation omitted). In particular, this Court long ago explained that the RLA, which governs labor relations in the airline industry, *see* 45 U.S.C. §181, permits a carrier to negotiate only with the union representing its employees and no other party. *See Virginia Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 548 (1937); *see also Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 235 (1st Cir. 1996) (rejecting claim by self-proclaimed "interested party" to participate in collective bargaining between carrier and union).

If Congress had intended to create an exception to the fundamental scheme that permits negotiation only with the employees' exclusive bargaining representative, it would have done so expressly. Indeed, Congress did exactly that when it enacted Section 1114 of the Bankruptcy Code, 11 U.S.C. §1114, in 1988, four years after it enacted Section 1113. Section 1114 provides that in certain circumstances (where the union opts out or the court determines that

different representation would be appropriate, *see* 11 U.S.C. §1114(c)(2)), the debtor is to negotiate proposed changes to retiree benefits with a committee of retirees authorized by the bankruptcy court. *See* 29 U.S.C. §1114(c)(2), (f)(1). In adopting this provision, Congress made plain that any departure from the federal statutory obligation to negotiate only with the employees' authorized union representative cannot be implied but must be made by positive statutory command. No such command exists in the text of Section 1113.

Section 1114 defines "retiree benefits" subject to negotiation by a retiree committee to include retiree health and life insurance benefits but *not* pension benefits. *See id.* §1114(a); *see Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 795 (4th Cir. 1998); *In re Farmland Indus., Inc.*, 294 B.R. 903, 919, 921 (Bankr. W.D. Mo. 2003). By deliberately excluding pension benefits from the scope of Section 1114, Congress made clear that retirees have no right to participate in negotiations over modifications to pension benefits.

This makes sense since a pension plan serves as a term of employment, in the form of deferred compensation, for active employees. There is no question that active employees, through their union, have the right in Section 1113 negotiations to agree to an employer's demand to change or eliminate the plan, just as they have a right to bargain other changes to their labor contract. To permit retirees a veto over such an agreement would be to deprive the active employees of the right freely to negotiate their terms of employment.

The Second Circuit did hold in *Century Brass* that when Section 1113 negotiations bear on vested retiree benefits, retirees must be represented in the negotiations. *See* 795 F.2d at 274. This holding conflicts with the plain language of Section 1113 that provides for negotiation only with the employees' authorized bargaining representative. Indeed, the Second Circuit acknowledged in *Century Brass* that its holding "departs somewhat from a literal reading of §1113."

Id. at 275. But even if *Century Brass* could somehow have been justified when it was decided in 1986, the subsequent enactment of Section 1114 in 1988 made clear that the Second Circuit's decision was at odds with congressional intent: Section 1114 confirms that any participation by retirees in negotiations regarding modification of collectively bargained rights is to be limited to *non-pension* benefits like retiree health and life insurance.

In arguing that retirees have a right to participate in Section 1113 negotiations over vested pension benefits, Petitioners also rely on this Court's decision in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). *See* Petition at 25. But *Pittsburgh Plate Glass* is not a bankruptcy case and predates Section 1113. It thus says nothing about whether retirees are entitled to participate in Section 1113 negotiations. Nor does the case state that even outside of the bankruptcy context, retirees have a right to inject themselves into labor-management negotiations. While the Court in *Pittsburgh Plate Glass* noted that "vested retirement rights may not be altered without the pensioner's consent," 404 U.S. at 181 n.20, it mentioned only one recourse available to a pensioner for a change made without his consent, namely, a claim for breach of contract. *See id.* It nowhere mentioned a retiree's right to participate in negotiations between the employer and union.

Indeed, Petitioners cite numerous cases for the proposition that an employer's promise of lifelong benefits is an enforceable contractual obligation, *see* Petition at 18 & n.14, but they cite not one case for the proposition that a retiree has the right outside of bankruptcy to participate in collective bargaining negotiations that may affect their benefits.[4] In any

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[4] In *Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976) (discussed at Petition at 22-23), the court found that the employers who were party to a multi-employer pension plan negotiated with the union to extinguish the plan and, in the process, deprived retirees of vested benefits. *See id.* at

event, this is a case about what happens in bankruptcy, where an employer, before the enactment of Section 1113, had no obligation to bargain with anyone, including the union, before rejecting a contract. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-26 (1984). Section 1113 limited that right by requiring the employer to bargain with the union, but it did not authorize other parties to participate in, and potentially frustrate, the already challenging labor-management bargaining process.

Because no good authority provides that retirees have a right to participate in Section 1113 negotiations, and because relevant legal principles provide no support for the existence of such right, there would be no compelling reason for this Court to take this case even if the Seventh Circuit had held that no right to retiree participation exists. As it is, the Seventh Circuit decision did not contain any such holding, making a grant of certiorari all the more inappropriate.

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637. The court nowhere suggested that the retirees had a right to participate in the labor-management negotiations. It simply held that the retirees who lost vested benefits had a claim for breach of contract and promissory estoppel. *See id.* *Hurd* is also factually distinguishable from the instant case, since unlike the agreement in *Hurd*, the Letter of Agreement here did not terminate the Plan or deny any retirees of benefits.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted

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